91-187

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No.

ROBERT AND ALICE BEARD,

Petitioners,

v.

SOUTH CAROLINA COASTAL COUNCIL, SIERRA CLUB, CHARLESTON NATURAL HISTORY SOCIETY AND SOUTH CAROLINA WILDLIFE FEDERATION,

Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA VOLUME 1

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

Robert and Alice Beard, Respondents,

vs.

South Carolina Coastal Council, Sierra Club, Charleston Natural History Society and South Carolina Wildlife Federation, Appellants.

Appeal from Horry County
James E. Moore, Judge

Opinion No. 23363

Heard June 1, 1990 - Filed March 11, 1991

REVERSED

C. C. Harness, III, of South Carolina Coastal Council, of Charleston, for appellant South Carolina Coastal Council; James Chandler, Jr., of Pawleys Island, for appellants Sierra Club, Charleston Natural History Society and South Carolina Wildlife Federation.

Fred B. Newby, of Myrtle Beach, for respondents Robert and Alice Beard.

ROBERT and ALICE BEARD v.
S. C. COASTAL COUNCIL, et al.

Dwight F. Drake, of Nelson, Mullins, Riley & Scarborough of Columbia, for Amicus Curiae, S.C. Tourism Council.

TOAL, A.J.: This case involves the denial of a permit application to build a bulkhead on beachfront property. The circuit court found that while the permit was properly denied, it constitutes an unconstitutional taking. We find that it does not and therefore reverse.

FACTS

On February 4, 1987, Robert and Alice Beard applied for a permit to construct a bulkhead approximately 205 feet in length across four lots of beachfront property.[1] The proposed bulkhead would advance the

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[1]The case is governed by the 1977 Coastal Zone Management Act because the application of was submitted prior to the passage of the 1988 Beachfront Management Act.

location of an existing bulkhead 18.5 feet seaward on two lots, 23.9 feet on a third lot and would be new construction on the fourth lot. All construction would take place in the beach critical area regulated by the Council.

The Beards stated that the purpose for the project was erosion control. When evidence was revealed that this area was not eroding, but rather accreting, the Beards admitted that they wanted to build the wall on their property line so they would be able to sell this property and to level it off so their tenants would not have to walk uphill or over a dune to the beach.

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The permit was denied by the Permit Administrator and Coastal Council for several reasons. First and foremost, the proposed construction would have violated the legislative policies of the Coastal Zone Management Act ("Act"). Like the 1988 Beachfront Management Act, the purpose of the 1977 Act was to protect, restore and enhance the coastal environment. To fulfill this purpose, the Act placed specific restrictions on the construction of bulkheads in the critical area. The proposed construction of the new bulkheads on the Beards' property did not fall within a statutory exception. In addition, the area was accreting thereby eliminating any need for new erosion control devices. Furthermore, the Beards

had existing bulkheads and had other alternatives available.

The circuit judge concluded that the permit was properly denied on the basis that the Council was "protecting a valuable resource and doing it in a manner consistent with the intent of the Coastal Zone Management Act to protect and wherever possible to restore significant natural resource critical areas." The lower court recognized that a "substantial and legitimate State interest" was involved but found that the denial of the permit constituted a "taking" because the denial of the permit had the effect of making the area between the existing and proposed wall a public beach. We disagree.

DISCUSSION

It is important to note at the outset that the Beards' complaints concern only a portion of their property. The Beards contend that only the area between the existing wall and the proposed wall has been "taken". On two lots this involves 18.5 feet and on the third lot, this portion consists of 23.9 feet. Each lot is approximately 125 feet deep. Therefore, over 100 feet on each lot remains unaffected. As an initial matter, the Beards' approach to a "takings" contention in the context of a zoning regulation is inaccurate. "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely

abrogated . . . . [The] Court focuses rather . . . on the . . . parcel as a whole." Penn Central Trans. Co. v. New York City, 438 U.S. 104, 130-31, 98 S.Ct. 2646, 2662-63, 57 L.Ed.2d 631 (1978).

Furthermore, the Beards may still sell the entire piece of property on each lot, including the area between the proposed and existing walls. Each lot contains rental units which are unaffected by any decision concerning the application. The Beards may continue to utilize the rental units. They may also exclude persons from the area between the proposed and existing walls by posting signs and having trespassers ejected from the property.

Thus, the enforcement of the regulation in this case has had a minimal impact on the Beards property. Indeed, the exercise of police power in this case is much like that utilized in zoning cases which involve set back requirements. We have long recognized the principle that the power to zone is exclusively for the legislature and that zoning decisions will not be interfered with when made in the exercise of the governing body's police power to accomplish the desired end unless there is a plain violation of citizens' constitutional rights. Talbot v. Myrtle Beach Board of Adjustment, 222 S.C. 165, 72 S.E.2d 66 (1952). In cases involving set back requirements, this Court has always looked at the application and impact on the individual property owner.

See e.g., Dunbar v. City of Spartanburg, 266 S.C. 113, 221 S.E.2d 848 (1976). It is clear that the application of the Act to the Beards' property in this case does not result in a violation of their constitutional rights.

This conclusion is buttressed by our recent decision in South Carolina Coastal Council v. Lucas, Op. No. 23342 (S.C. Sup. Ct. filed February 11, 1991), wherein we held that no compensation is due a landowner whose private use threatens serious public harm.

The State has a legitimate interest in protecting the public from serious harm. In the Act, the Legislature made specific findings regarding the coastal environment

and set forth policies concerning the protection of the beaches. The Beards did not challenge the legislative findings and policies, nor did they challenge the lower court's conclusion that a "substantial and legitimate State interest" was involved. The failure to contest these findings and policies constitutes a concession that the protection of the coastal environment is a substantial State interest and that regulation of the property is necessary to protect against serious public harm. Protection against serious public harm justifies strict government regulation of the property thereby prohibiting the finding that the property has been "taken". Lucas, supra, and cases cited therein.

Having reached this conclusion, we need not address the remaining issues on appeal.

The lower court is **REVERSED**.

GREGORY, C.J., and FINNEY, A.J., concur. **HARWELL, A.J.,** dissenting in separate opinion. **CHANDLER, A.J.,** concurring in separate opinion.

HARWELL, A.J., dissenting in separate opinion.

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DISSENT

HARWELL, A.J.: I respectfully dissent. I would affirm the circuit court's finding that the denial of the permit constituted an unconstitutional taking. For a complete analysis of my reasoning, see my dissent in South Carolina Coastal Council v. Lucas, Op. No. 23342 (S.C. Sup. Ct. filed February 11, 1991) (Davis Adv. Sh. No. 4 at 21).

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CHANDLER, A.J., concurring in separate opinion.

CHANDLER, A.J. (Concurring): While I concur in the majority's conclusion that reasonable setback requirements do not constitute a taking for which compensation is required, I adhere to the dissent's position in South Carolina Coastal Council v. Lucas, Op. No. 23342 (S. C. filed February 11, 1991), that a taking arises whenever the regulation deprives the landowner of "economically viable use" of his property.

STATE OF SOUTH CAROLINA
In the Supreme Court

David H. Lucas, Respondent.

vs.

South Carolina Coastal Council, Appellant,

Appeal from Charleston County
Larry R. Patterson, Special Circuit Judge

Opinion No. 23342
Heard April 2, 1990 - Filed
February 11, 1991

D I S S E N T

HARWELL, A.J.: I respectfully dissent. For the reasons discussed below, I would affirm the circuit court order which determines that application of the Beachfront Management Act under these facts does constitute a taking, and hold that the Coastal Council must either

compensate Lucas in the amount set forth in the order of the circuit court or issue a permit for the construction of habitable structures on his property pursuant to the 1990 amendments to the Beachfront Management Act.[1]

DISCUSSION

The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The South Carolina Constitution provides that "private

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[1]Although certain amendments to the Beachfront Management Act had not been enacted at the time this case was abjudicated, I note that neither the majority opinion nor the dissent prohibit Lucas from pursuing a course of action under the 1990 amendments which would enable him to construct a new habitable structure within the guidelines set forth in the amendments. See, S.C. Code Ann. §48-39-290(A)(6) and 48-39-290(D)(1) (Supp. 1990).

property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor." S.C. Constr. Art I, § 13. Takings cases are generally recognized as falling into one of two categories: Those pursuant to an exercise of eminent domain and those pursuant to an exercise of the police power. Eminent domain involves the taking of property for public use for which compensation is required to be made; police power involves regulation of private property to prevent its use in a manner detrimental to the public interest and will not necessarily result in a taking in the constitutional sense. Carter v. South Carolina Coastal Council, 281 S.C. 201, 204, 314 S.E.2d 327,1 329 (1984). A governmental taking of property may, however, be accomplished

without the formal apparatus of eminent domain; a taking may result from a government regulation in a particular areas. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250, 265 (1987).

The question of when regulation pursuant to a police power becomes a taking is not easily answered. Despite the wealth of authority on the subject of regulatory takings, this is an area of considerable confusion. Indeed, as Justice Stevens recognized in his dissent in First English Evangelical, the regulatory takings decisions of the United States Supreme Court have been "open-ended and standardless." 482 U.S. at 340, 107 S.Ct. at 2378, 96 L.Ed.2d at 280 (footnote 17). As one commentator noted, the

"[r]egulatory taking doctrine is the most perplexing area of American land use law."[2] This case necessitates explication of the pertinent decisions in this area and reflects my interpretation of regulatory takings law.

The starting point for this discussion with the 1887 case of Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) in which the Supreme Court recognized that "government can prevent a property owner from using his

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[2]Settle, Regulatory Taking Doctrine in Washington, Now You See It, Now You Don't, 12 U. Puget Sound L. Rev. 339 (1989). The lack of uniformity in this area has been noted by other commentators. See e.g. C. Harr, Land Use Planning (3d ed. 1977); Berger, A Policy Analysis of the Taking Problem, 49 N.U. U. L.Rev. 165 (1974); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L.Rev. 1165 (1967); Rose, Mahon Reconstructed: Why the Takings Clause is Still a Muddle, 57 S.Cal. L.Rev. 56 (1984).

property to injure others without having to compensate the owner for the value of the forbidden use." Penn Central Transportation Co. v. New York, 438 U.S. 104, 144, 98 S.Ct. 2646, 2669, 57 L.Ed.2d 631, 661 (1978). At issue in Mugler was a statute prohibiting use of a distillery for the manufacture of intoxicating liquors. The Supreme Court upheld the statute and reasoned that the power of the State to prohibit uses of property "prejudicial to the health, the morals, or the safety of the public, is not . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain." Mugler v. Kansas, 123 U.S. at 669, 8 S.Ct. at 301, 31 L.Ed. at 213.

Mugler stands for the proposition that where the legislature has deemed an

act to be necessary for the public's health, safety and welfare, the judiciary need not scrutinize the acts of the legislature regardless of the extent of loss suffered by the property owner. A prohibition on the use of property, enacted in the interest of the community as a whole, the Mugler Court held, cannot be deemed a taking or appropriation.

For the same reasons as those articulated in Mugler, the Supreme Court has held other state action not to constitute a compensable taking when necessary to prevent property owners from using such property in a manner which I perceive to be best described as nuisance oriented. See e.g., Headacheck v.Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (statute disallowing operation of a brickyard in a residential

area); Reinman v. City of Little Rock, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900 (1915) (law disallowing operation of livery stable in downtown area); Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (statute ordering destruction of red cedar trees because they produced cedar rust fatal to apple trees, an important state crop).

The viability of the Mugler analysis was first questioned in Pennsylvania Coal v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). Instead of following the Mugler approach of deferring to the judgment of the legislature with respect to the regulation at issue in Pennsylvania Coal, the Supreme Court instead evaluated the subject regulation and determined that the public interest it protected was not sufficient

to warrant an exercise of police power. Justice Holmes, writing for the majority, noted that "[a] . . . strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal v. Mahon, 260 U.S. at 416, 43 S.Ct. at 160, 67 L.Ed. at 326. Rather, the general rule as enunciated in Pennsylvania Coal is that "[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415, 43 S.Ct. at 160, 67 L.Ed. at 326.

The test which emerged from Pennsylvania Coal is that a reviewing court should first determine whether a regulation sufficiently implicates the public interest such that a state can

enact it as a legitimate police power measure; and second, determine the extent of diminution in value suffered by the property owner. If the regulation goes too far, it is a taking for which an owner must be compensated. The test has recently been more succinctly stated to be that land use regulation can effect a taking if it "does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land." Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1980).

After Pennsylvania Coal, the Mugler rule was no longer viewed as dispositive. In fact, the Mugler approach was essentially the same as that of the minority opinion in the Pennsylvania Coal case: that as long as a regulation serves

an appropriate means to public end, restriction upon use does not constitute a taking merely because it deprives the owner of the property's only profitable use. Pennsylvania Coal v. Mahon, 260 U.S. at 417, 43 S.Ct. at 160, 67 L.Ed. at 326. (Brandeis, J. dissenting). Therefore, after Pennsylvania Coal, the Mugler case was thought by many to have fallen by the wayside. This perception was dispelled however, five years later with the Supreme Court's decision in Miller v. Schoene, supra. In Miller, the Supreme Court, applying Mugler, upheld a statute which required the owners of red cedar trees to destroy the trees because they produced cedar dust, a disease fatal to the state's apple crop. Thus, after Miller, some confusion existed as to whether to apply the Mugler rule or that of Pennsylvania

Coal. In two subsequent cases, Goldblatt v. Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) and Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Supreme Court applied, respectively, the Mugler and the Pennsylvania Coal test.

In Goldblatt v. Hempstead, supra, the Supreme Court upheld, pursuant to a Mugler nuisance analysis, a statute forbidding excavation of sand below the water line. The Goldblatt Court nonetheless recognized that certain regulations may be "so onerous as to constitute a taking which constitutionally requires compensation." 369 U.S. at 594, 82 S.Ct. at 990, 8 L.Ed.2d at 133.

In Penn Central Transportation Co. v. New York City, supra., the Supreme

Court upheld a landmark preservation law which prohibited Penn Central Railroad from erecting an office tower on top of the Grand Central Railroad Terminal. In Penn Central, the Court candidly admitted that it had previously been unable to develop any "set formula" for determining when "justice and fairness" require the government to compensate landowners. 438 U.S. at 124, 98 S.Ct. at 2659, 57 L.Ed.2d at 648. In upholding the preservation law, the Court applied the Pennsylvania Coal test and determined that because the regulation served a strong public interest, did not completely destroy the economic value of the property, and did not substantially interfere with reasonable investment backed expectations, it did not constitute a taking. The test first enunciated in Pennsylvania Coal,

therefore continued in Penn Central to be that regulation can effect a taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of its land." Because the preservation law advanced a legitimate state interest and the owner retained economically viable use of the terminal, a taking was determined not to have occurred.

The next significant decision of the Supreme Court to address the test to be applied in regulatory takings cases is Keystone Bituminous Coal Association v. Debenedictis, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). In Keystone, the plaintiffs challenged the constitutionality of a Pennsylvania statute known as the Bituminous Mine Subsidence and Land Conservation Act. The

Subsidence Act required coal companies to keep in the ground at least 50% of the coal beneath defined structures to protect these structures from subsidence damage. Although the Supreme Court held that a taking had not occurred, the method by which it arrived at this holding has been the subject of considerable debate. Part of the reason for this debate is the persistent confusion over when Mugler is applicable. Although it continues to recognize the vitality of the Mugler line of cases, the Keystone Court nonetheless continues to retain the two prong test first recognized in Pennsylvania Coal. The Keystone Court unequivocally recognizes that it retains this as the test by stating:

> "The two factors that the Court considered relevant [in Pennsylvania Coal],

> have become integral parts of our taking analysis. We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interest, . . . or denies an owner economically viable use of his land.'" Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1980) (citations omitted); see also, Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978).

and continues by holding that: "[a]pplication of these tests to petitioners' challenge demonstrates that they have not satisfied their burden of showing that the [Act] constitutes a taking." 480 U.S. at 485, 107 S.Ct. at 1242, 94 L.Ed.2d at 488. Clearly then, despite the myriad of considerations which go into an analysis of the factors

included in the above-mentioned test, it still emerges as the test after Keystone.

The first prong of this traditional test is discussed under the heading of "The Public Purpose." Keystone Bituminous Coal Association v. Debenedictis, 480 U.S. at 485, 107 S.Ct. at 1242, 94 L.Ed.2d at 488. It is at this point that the Court explicitly holds that its Mugler line of cases were not overruled by Pennsylvania Coal. 480 U.S. at 490, 107 S.Ct. at 1244, 94 L.Ed.2d at 491. The Court then goes on to affirm that a state's interest in "preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation." 480 U.S. at 492, 107 S.Ct. at 1246, 94 L.Ed.2d at 493. The Court further holds that the act at issue in Keystone "plainly seeks to

further such an interest." Id. In so holding, the Keystone Court equates subsidence mining to the nuisances sought to be abated in the Mugler line of cases. Accordingly, the Keystone opinion reaffirms the teaching of Mugler that certain uses are so noxious that an owner is not entitled to compensation, and that "the nature of the state action plays [an important role] in our takings analysis." 480 U.S. at 490, 107 S.Ct. at 1245, 94 L.Ed.2d at 491. Although the Keystone opinion marks a continued recognition of the Mugler rule, it does not abolish the Pennsylvania Coal factors. Further, the Keystone Court does not hold that every exercise of police power can escape the Constitution by calling that which it seeks to prevent a nuisance. Such an interpretation would totally eviscerate

the takings clause. Indeed, if we were to accept an interpretation of Keystone, based on Mugler, that any exercise of police power could not effect a taking, we would have to say that there would never be any need to reach the second part of the test: diminution in value. No matter how valueless a person's property, if the taking was pursuant to a valid exercise of the police power it could never be compensated. As feared by the dissenters in Keystone, this could become an exception which would swallow the rule. Keystone, 480 U.S. at 512, 107 S.Ct. at 1256, 94 L.Ed.2d at 505 (Rehnquist, J., dissenting).

The Constitution of the United States and of South Carolina provided a just compensation clause for the protection of citizens; surely the framers

of these constitutions never intended for this protection to be distinguished away in order to allow states to avoid compensating an individual required to bear a burden which in fairness should be borne by all. Therefore, I simply refuse to accept that the Mugler line of cases "grant carte blanche to government agencies to regulate private property into oblivion." Berger, The Year of the Taking Issue, 1 B.Y.U.J. Pub. L. 261, 279 (1987). Rather, I would hold that some factual situations may lend themselves to the harsh rule in Mugler, whereas others must be recognized as situations in which one individual should not be called upon to bear a burden which in fairness should be borne by all. My interpretation of Keystone is that a court must first review the public purpose of a regulation. Some

regulations will be held unconstitutional because the public purpose for which they are enacted is not deemed to be legitimate or sufficient. Other regulations may provide for the prevention of a nuisance and as such will not require compensation to an affected landowner. Other regulations not designed to prevent a nuisance may nonetheless legitimately advance state interests and yet require compensation upon a showing of a loss of economically viable use of land.

In my opinion, the Beachfront Management Act does not have as its primary purpose the prevention of a nuisance and is therefore not subject to the Mugler analysis. The activities and effects the Act seeks to prohibit do not rise to such a level as to be fairly considered "noxious." The primary purpose

of the Beachfront Management System Act is to protect and foster the regeneration of the beach/dune system, the benefits of which enure to the State of South Carolina by among other things, promoting tourism, creating a habitat for indigenous flora and fauna, creating a place which harbors natural beauty, and providing a barrier and buffer from high tides, storm surge, hurricanes and normal ercsion. The Act also lists other similar findings and policies of the Act. Upon my review of the Act, I conclude that none of these intended purposes can fairly be said to resemble a nuisance. The goals which the Act seeks to accomplish do not appear in any way similar to protecting an important state resource from an infectious disease (Miller v. Schoene), prohibiting excavations below the water table for

safety purposes (Goldblatt), prohibiting an illegal use of a distillery (Mugler), preserving the residential integrity of an area by prohibiting a brickyard (Hadacheck) or protecting patrons of a downtown area from the unpleasantness associated with a livery stable (Reinman). Accordingly, I do not find as did the Keystone Court, that the Act at issue here plainly seeks to further "public interest in preventing activities similar to public nuisances" such that it is entitled to the protection afforded by Mugler.

This is not to say that the Act itself is invalid. Even though an act is not of the Mugler variety, it can remain valid if it nonetheless advances a legitimate state interest. However, if it is not a Mugler type act, despite the fact that it advances a legitimate state

interest, compensation will be necessary where the act deprives an owner of economically viable use of his land. Lucas has conceded the "laudable" goals of the Act and does not challenge the legitimacy of its public purpose. Thus, the remaining question is whether his property retains economically viable use.

Although the Keystone Court indicated that it could end its analysis with its determination that the Subsidence Act sought to "prevent activities similar to public nuisances," it held that it "need not rest [its] decision on this factor alone, because petitioners have also failed to make a showing of diminution of value sufficient to satisfy

the test set forth in Pennsylvania Coal[3] and our other regulatory taking cases." Keystone Bituminous Coal v. Debenedictis, 480 U.S. at 493, 107 S.Ct. at 1246, 94 L.Ed.2d at 493. The Court did not have to reach the diminution in value question because the only issue left to it by the federal district court was whether the "mere enactment of the statues and regulations constitutes a taking." Id. The next phase of the case would have concerned evidence about the actual effects the Subsidence Act had on the owners' property.

In assessing the question of whether Lucas retains any economically viable use of his land, we are nonetheless

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[3]We note that this is another reference by the Keystone Court to the continued vitality of the Pennsylvania Coal test.

guided by the Keystone decision. The Keystone Court held that the critical distinction in this regard involves a comparison of the value that has been taken from the property with the value that remains in the property. 480 U.S. at 497, 107 S.Ct. at 1248, 94 L.Ed.2d at 496. "[W]here an owner possesses a full bundle of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." Id. [citation omitted]. Applying these factors, the Keystone Court determined that

> When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have

> been denied the economically viable use of that property.

480 U.S. at 499, 107 S.Ct. at 1249, 94 L.Ed.2d at 497. The Court further determined that there was no showing that "petitioners reasonably investment-backed expectations were materially affected." Id.

The facts of Keystone contrast sharply with those present in this case. The testimony in this case was that Lucas purchased two lots for development. Lucas planned to erect single family dwellings on the lots and intended to put one home on the market for sale and retain one for his family. At the time Lucas invested in these lots, his reasonable expectations were that he could proceed with these plans. However, according to the testimony of Lucas' appraiser, the Act's

prohibition against the erection of any habitable structure caused the value of the lots to plummet to zero. The lots now lack fair market value and there is no economically viable use. Although the Coastal Council introduced testimony that the lots would have some value, its expert was completely unable to explain the method relied upon to arrive at this conclusion. The trial judge chose the conclusion of Lucas' expert over that of the Coastal Council's expert. This Court generally defers to the discretion of the trial judge on these matters because he is in a better position to observe the demeanor of the witnesses and pass on their credibility. Further, from my own review of the record, I find the valuation of the Coastal Council's expert to have been totally speculative. Accordingly,

since Lucas' land has no fair market value, I would hold that the second part of the test, deprival of economically viable use, has been met and a taking has been established.

Having determined that application of the Act constitutes a taking under the Constitution of the United States, it is not necessary to examine whether it constitutes a taking under the South Carolina Constitution.[4] The remaining

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[4]There are several South Carolina decisions involving takings under the compensation clause. One of the most recent cases is Carter v. S.C. Coastal Council, 281 S.C. 201, 314 S.E.2d 327 (1984) in which we held that restrictions which disallowed a landowner from filling in wetlands did not constitute a taking. In Carter, this Court did not specify whether its analysis of the takings issue was pursuant to federal or state law. Regardless, I do not see Carter as controlling under the facts of this case, particularly since we must look to federal decisions for the proper interpretations of the United States Constitution. In

question is the appropriate remedy to be afforded the property owner now that a taking has been determined. The most recent amendments to the Act, specifically, S.C. Code ann. §§ 48-39-290(A)(6) and 48-39-290(D)(1) (Supp. 1990), provide that an applicant may request a special permit to build a structure other than an erosion control structure or device seaward of the baseline that is not otherwise allowed pursuant to Sections 48-39-250 through 48-39-360. If Lucas' application is denied, in the alternative, I would hold that Lucas be compensated for the loss of use

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Carter, we held that every regulation "will not necessarily be a [taking] in the constitutional sense." Implicit in this is a recognition that there nonetheless will be situations where regulation will be a taking. As indicated by the analysis in this opinion, I would hold that this is one of those situations.

of the land pursuant to the circuit court order.

Although I affirm the decision of the circuit court that a taking occurred, I would remand the matter to the Coastal Council for its decision as to whether to issue permits in view of the recent 1990 amendments to the Beachfront Management Act for construction of a habitable structure on the lots. If the Council should decline to issue such special permit, I would require that Lucas be compensated pursuant to the circuit court order.

CHANDLER, A.J., concur.

STATE OF SOUTH CAROLINA	)	IN THE COURT
	)	
COUNTY OF HORRY	)	OF COMMON PLEAS
	)	
Robert Beard and Alice Beard,	)	
	)	
Petitioners,	)	FINAL ORDER
	)	
vs.	)	
	)	(88-CP-26-3503)
The South Carolina Coastal Council, Sierra Club, Charleston Natural History Society, and South Carolina Wildlife Federation,	)	
	)	
Respondents.	)	

This matter came before me for a final hearing on June 19, 1989. This is a judicial appeal of a final administrative action by the South Carolina Coastal Council. Present at the hearing were Fred B. Newby of the Horry County Bar, representing the Plaintiffs; C.C. Harness, III, General Counsel to the South Carolina Coastal Council; James S. Chandler of the Georgetown County Bar, representing the

Sierra Club, the Charleston Natural History Society and the South Carolina Wildlife Federation; and Dwight F. Drake, of the Richland County Bar, representing the South Carolina Tourism Council. The Tourism Council made a motion to be allowed to file an amicus curaie brief on behalf of the Plaintiffs and, with all parties consenting, that motion was granted.

At the hearing, oral arguments were heard by all of the named parties. Written briefs were also subsequently filed by all parties.

The Parties

The Petitioners in this action are Robert Beard, Jr. and Alice Beard, two individuals who are citizens and residents

of Horry County, South Carolina. The administrative action which is the subject of this case involves four adjoining oceanfront lots belonging to the Petitioners and situated in Horry County.

The Respondent, South Carolina Coastal Council, is a state administrative body created by the legislature in §48-39-40 of the Coastal Zone Management Act, as it was enacted in 1977. The remaining respondents are intervenors in the administrative proceeding.

The Property

The administrative action which is the subject of this case relates to property consisting of Lots 2, 3, 4, and 5 of Block SF, of the Cherry Grove section

of North Myrtle Beach, South Carolina (the "Property").

Jurisdiction

This is an action for judicial review of an administrative proceeding undertaken by the South Carolina Coastal Council. The review is sought pursuant to statutory authority conferred in the South Carolina Coastal Zone Management Act (§48-39-10, et seq., Code of Laws of South Carolina, 1976, as amended - the "Act") and the South Carolina Administrative Procedures Act (§1-23-130, et seq., Code of Laws of South Carolina, 1976, as amended - the "APA"). The action involves real property located in Horry County, South Carolina. The parties stipulated that this action is governed under the Act

as it existed prior to its 1988 amendments.

The Factual Background of this Case

The facts as set out in the administrative proceeding reveal the following:

The Beards are the fee-simple owners of the Property, having acquire the lots at different times over the years. Lot 4 was acquired in 1961, Lot 3 was acquired in 1966, Lot 2 was acquired in 1970 and Lot 5 was acquired in 1980. On each of the lots there are structures that consist of two-story wood frame houses that are rented by the Petitioners to the public.

Each of the lots lies between, and adjoins, the Ocean Boulevard on the west and the Atlantic Ocean beaches on the east. Each of the lots is 125 feet in depth, from the road to the beach, and 50 feet in width.

At some time prior to the enactment of the Act in 1977, the Petitioners, or their predecessors in title, erected wooden bulkheads on the lots, none of which were located on the easternmost property line of the Property, but instead were some distance landward of the Beards' property line. These bulkheads are shown as the "existing seawall" on the plat which is in the record.

On February 4, 1987, the Petitioners filed an application with the

respondent Coastal Council for the purpose of erecting a new wooden bulkhead on their property in the approximate location of the easternmost property line of the Property, still on their land, and thus having the effect of moving the bulkhead approximately 18 feet to 24 feet seaward of its original position. The permit as applied for would move the existing wall on Lots 2 and 3 approximately 18.5 feet forward. On Lot 4 the seawall would be brought forward approximately 23.9 feet and as to Lot 5, the permit request construction of an entirely new wall consistent with the movement forward of the wall on the other lots. The permit if granted would advance the bulkhead seaward to the property line into an area that is characterized as dry-sand beach.

According to the permit application, the work, as proposed and shown on the attached plans consists with constructing the bulkhead/seawall of timber and would be built at an elevation of +8 mean sea level. The Petitioners propose that approximately 2,270 cubic yards of fill material would be placed behind the wall. The purpose stated for the project is erosion control.

The Administrative Proceeding

By letter dated March 30, 1987, the Coastal Council, through Steve Moore, Permit Administrator, denied the Petitioners' permit application. On April 7, 1987 the Petitioners filed their Notice of Intent to Appeal, and on April 22, 1987, they filed, with the Coastal

Council, their Grounds for Appeal and Appeal.

In that filing the Petitioners asserted several grounds in asking the full Coastal Council to overturn the permit denial which had been made by its staff. Among those reasons, the Beards asserted that:

> "The actions of the Staff have the effect of [creating] a 'public' beach on land that is privately owned by the Defendants. This action, together with the [Council's] prevention of any valid use of the land by the Defendants, constitutes a 'taking', by

the State, of the Defendants' private property without due process or just compensation. Article I, Section 13, South Carolina Constitution; U.S.C.A. Const. Amend. 5" Appeal and Grounds for Appeal, p. 2.

"The effect of the [Council's] decision is to take private property of the [Beards] ... and convert it to public use, all of which violates Section 48-29-30(c), Code of Laws of South Carolina, 1976, as amended. As such this action should be set

aside by the full Council." Appeal and Grounds for Appeal, p. 2, 3.

"In deciding permit requests the [Council] must comply with Regulation 30-11. The [Beards] have met all these requirements. The action of the [Council] in denying the permit is both arbitrary and capricious and not founded in fact." Appeal and Grounds for Appeal, p. 3.

"Section 48-39-150(A) of the Code states that, in determining permit

questions, the Council 'shall base its determination on the individual merits of each application...'. No factual determinations were made that the permit would be detrimental to the beach... prior to its decision." Appeal and Grounds for Appeal, p. 3.

"The Defendants' land is in an area where the beach has grown ... The seawall requested by the [Beards] ... the use of approximately five thousand (5,000) square feet of their private

property ..." Appeal and Grounds for Appeal, p. 4.

Following a period of discovery the administrative appeals process proceeded to a full evidentiary hearing before a Hearing Officer for the Coastal Council. This hearing took place over several days between December 1987 and March 1988. The transcripts of these hearings are part of the record.

On July 1, 1988 the Hearing Officer issued her Recommendations. These were objected to by the Petitioners in a final hearing before the full Coastal Council on July 15, 1988. By its Final Administrative Order, dated September 2, 1988, the Coastal Council upheld the Coastal Council staff's denial of the

Beards' permit. This denial gave rise to the present action.

Before the full Coastal Council the Beards argued, and briefed, not only the same grounds for reversal that were set out in their Appeal and Grounds for Appeal, but also others that arose during the evidentiary hearing. (The Beards' Appellants' Brief is a part of the record before the Court in this action.) Among their grounds for reversal were:

a. The proposed work was on the Beards' private property;

b. The beach in question is accretional and not eroding;

c. All of the expert witnesses that testified at the hearing

stated that the proposed work would not harm the beach;

d. Neither the City of North Myrtle Beach, nor the adjoining landowners, objected to the bulkhead;

e. There would be no cumulative impact of the proposed work, due to the 1988 amendments to the Beachfront Management Act;

f. Each case must be decided on its own merits;

g. The Beards had complied with §48-39-150 and Regulation 30-11 relating to the issuance of permits;

h. Factual findings by the Staff were erroneous;

i. The effect of the denial was to turn the Beards' property into a "public beach" and would constitute a "taking" of their property.

The recommendations of the Hearing Officer consisted of eighteen (18) pages and addressed most, if not all, of these issues. The Final Administrative Order issued by the full Coastal Council on September 2, 1988 was a thirty-nine (39) page Order that dealt not only with all of the factual, statutory, regulatory and constitutional issues raised by the Beards, but also relied to some degree on

other matters of law not previously raised.

On September 30, 1988 the Beards instituted this action for judicial review by filing their Summons and Petition for Review. All parties were served and have answered and are properly before the Court. The full administrative record has been forwarded by the Coastal Council and is part of the court file in this case.

Authority for the Appeal

As stated above, this appeal is made pursuant to two statutes. First, the appeal is governed and authorized by the South Carolina Administrative Procedures Act. Section 1-23-380 provides the outline for such judicial appeals:

"§1-23-380. Judicial review upon exhaustion of administrative remedies.

(a) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article and Article 1. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief or trial de novo provided by law. A preliminary, procedural,

or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

...

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or

statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of

discretion or clearly unwarranted exercise of discretion."

In addition to the Administrative Procedures Act, which provides judicial review of any administrative agency's final actions, the Coastal Zone Management Act also has specific guidelines for appeals of actions by the Coastal Council. Section 48-39-180 provides as follows:

§48-39-180. Judicial review of permit determinations. Any applicant whose permit application has been denied, revoked, suspended or approved subject to

conditions of the Council, or any person adversely affected by the permit, may, within twenty days after receiving notice thereof, file petition in the circuit court having jurisdiction over the affected land for review of the Council's action "de novo" or to determine whether the Council's action so restricts or otherwise affects the use of the property as to deprive the owner of its existing practical use and is an unreasonable exercise of the State's police power because the action constitutes the

equivalent of taking without compensation. If the court finds the action to be an unreasonable exercise of the police power it shall enter a finding that the action shall not apply to the land of the plaintiff, or in the alternative, that the Council shall pay reasonable compensation for the loss of use of the land ... It is specifically intended that any person whose permit application has been denied may have such permit issued by the circuit court having jurisdiction if such

person can prove the reasons given for denial to be invalid." [Emphasis Added]

Although the provisions calling for a "de novo" review have been voided by the State Supreme Court in Guerard v. Whitner, 276 S.C. 521, 280 S.E.2d 539 (1981), the remainder of this section remains in tact.

Scope of Review for Factual Issues

It is settled that the scope of review of factual determinations by administrative agencies in general, and the Coastal Council in particular, is the "substantial evidence" standard. State v. S.C. Coastal Council, 289 S.C. 445, 346 S.E.2d 716 (1986); Carter v. S.C. Coastal

Council, 281 S.C. 201, 314 S.E.2d 327 (1984); Guerard v. Whitner, 276 S.C. 521, 280 S.E.2d 539 (1981). Under this standard it has been said that,

> "The Court will not substitute its judgment for that of the Agency unless it is affected by error of law or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." State v. S.C. Coastal Council, 289 S.C. 445, 448.

The term "substantial evidence" has been defined as follows:

> "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." Carter v. S.C. Coastal Council, 281 S.C. 201, 203.

Using these general rules the court must then review the record of the administrative proceedings. In fact, the review of factual matters must be confined to the existing record, and the court may not substitute its judgment as to the weight of the evidence on questions of fact. See §1-23-380(f) and (g).

In addition to reviewing the factual and evidentiary matters in the record under the substantial evidence standard, the Administrative Procedures Act also allows the court to "...reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative and

substantial evidence
on the whole record;
or

(6) Arbitrary or
capricious..."

Section 1-23-380(g), Code of Laws of South Carolina, 1976.

All of these violations have been alleged by the Beards.

Standard of Review of Constitutional and Legal Questions

As a general rule, courts may look to the constitutional issues raised in or by an administrative proceeding.

"The order or action of an administrative agency may be judicially reviewed as to constitutional questions and questions of constitutional rights." 73A C.J.S. Public Administrative Law and Procedure §229, p. 306.

Also, judicial review of questions of law is permitted.

"On a judicial review of an order, decision, or award of an administrative...agency, questions of law are open for... determination, including an administrative agency's

conclusion of law, or its determination, or decision of a question of law; the court is not bound, or concluded by, but free to substitute its own judgment for the judgment or conclusion of the agency. The reviewing court may correct errors of law and it may interfere with an administrative action where the agency has either violated, misconstrued, improperly construed, or failed to follow the law". 73A C.J.S. Public Administrative Law and Procedure, §242, p. 357-

358. See also, S.C. Tax Commission v. S.C. Tax Board, 278 S.C. 556, 299 S.E.2d 489 (1983).

This general statement of the law has been codified in South Carolina in the previously quoted sections of the State APA.

The Beards, in their Petition, have raised these issues and asked that the permit denial be overturned for the reasons stated, which can be summarized as follows:

(1) The decision is "in violation of constitutional... provisions";

(2) The decision is "in violation of...statutory provisions";

(3) The decision is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record"; and

(4) The decision is arbitrary and capricious".

Motion to Dismiss by Coastal Council

The first matter to be addressed of is a pending motion by the Coastal Council to dismiss the judicial appeal of

the Beards. At the hearing this motion was amended to be a motion for partial dismissal, the counsel for Coastal Council admitting that the issue of an unconstitutional taking was properly before the court. With this amendment, the motion appears to be based upon an assertion by the Coastal Council that the Petitioners' Petition for Review was not sufficiently detailed to give the court, and the Coastal Council, adequate notice of the acts complained of. As its sole authority for this position the Coastal Council cites the case of Smith v. South Carolina Department of Social Services, 284 S.C. 469, 327 S.E.2d 348 (1985). For the reasons set out below, I find this argument unpersuasive and the Smith case clearly distinguishable.

First, and foremost, it cannot be forgotten that this is an appeal of a previous proceeding, not a newly instituted action. In a newly instituted action there is no record before the court and no previous legal interaction between the adverse parties. In such a case the only notice the defendant has of the plaintiff's allegations are the ones set out in his complaint. In an appeal of an administrative action we cannot look at the Petition in isolation and ignore the previous proceedings on which it relies. Without those previous proceedings there could be no appeal.

The Beards' Petition for Review asks for judicial review of the administrative proceeding and for certain other affirmative relief. Among other

things the Beards allege that the Coastal Council's actions were:

> "(a) In violation of constitutional and statutory provisions of the law;
>
> (b) Affected by error of law;
>
> (c) Clearly erroneous in view of the reliable probative and substantial evidence on the whole record; and
>
> (d) Arbitrary and capricious and characterized by abuse of discretion."

As stated, the Coastal Council concedes that the question of an unconstitutional "taking " is properly before the court. Although our ruling in this case may make the balance of Coastal Council motion moot, we will address it nevertheless.

The Beards' Petition is brought pursuant to the APA and §48-39-140 of the Act. The allegations in the Petition are the very requirements set out in §1-23-380 of the APA for reversal of an administrative action. It is the Petitioners' position that, viewed in the context of the entire proceeding, and in accordance with the APA, the Petitioners' Petition gives the court and opposing parties ample notice of the errors complained of. I agree for the following reasons:

1. The APA and the Petition refer the court to the "substantial evidence" test "on the whole record". Obviously this test can only be met by having the court review the entire record for the presence, or lack of, "substantial evidence". This allegation is clearly sufficient to raise that issue, and is, in fact, the only reasonable way to do so.

2. The record submitted to this Court by the Coastal Council is complete, and it demonstrates that the Council agrees with the position that the entire record must be reviewed.

3. The allegations relating to constitutional and statutory violations are further defined by alleging a "taking" of the Petitioners' property, and those questions were fully

pled, briefed and argued in the record which the Court has before it.

4. The case cited by the Coastal Council is clearly distinguished from the one at bar since in that one the Petition merely stated that the petitioner was "aggrieved by the final decision", with no other allegations.

5. Petitions in similar cases that have been reviewed as far as the State Supreme

Court have had far fewer specifics alleged than that of the Petitioners, as in the often cited case of Carter v. S.C. Coastal Council, 281 S.C. 201, 314 S.E.2d 327 (1984). (A copy of that Petition was attached to Petitioners' Brief).

6. The purpose of pleadings is to place the adverse party on notice of the questions at issue. Bradley v. Hullander, 266 S.C. 188, 222

S.E.2d 283 (1976); Langston v. Niles, 265 S.C. 445, 219 S.E.2d 829 (1975). This appeal should not be viewed in a vacuum but in light of the previous proceedings. Since all of the issues have not only been pled, but argued and brief by all parties, the Coastal Council can hardly say that they are not intimately familiar with the issues. See Owen Steel Co. v. S.C. Tax Commission, 281 S.C. 80, 313

S.E.2d 636 (Ct. App. 1984) cert. den. 106 S.C. 1643, in which the court stated: "...the APA requires one seeking judicial review of a final agency decision to serve the agency with a copy of the petition for review. This requirement insures that the agency will receive notice of any proceeding to review its decision." 281 S.C. 86. [Emphasis Added.]

7. Since this appeal is not an evidentiary or fact finding proceeding, evidentiary facts need not be pled or matters realleged which are already in the record before the court.

8. When a pleading is demurred to for alleged failure to state a cause of action, it must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences

to be drawn therefrom entitle him to relief on any theory of the case. Todd v. South Carolina Farm Bureau, 276 S.C. 284, 278 S.E.2d 607 (1981).

9. Pleadings should be construed liberally so that substantial justice is done between the parties. Manning v. Dial, 271 S.C. 79, 245 S.E.2d 120 (1978).

10. The fact that placing in issue the sufficiency of evidence for the

administrative ruling is sufficient can be seen in Roche v. S.C. Alcoholic Beverage Control Comm., 263 S.C. 451, 211 S.E.2d 243. There the Court stated that "...the sole issue on appeals of this nature is whether the Commission had sufficient evidence to support its decision". 211 S.E.2d at 245.

Based upon the foregoing, and the full record of the administrative proceeding that is already before this

Court, I hereby deny the motion to dismiss.

The Appeal

Having determined that the Coastal Council's motion to dismiss, as amended, should be denied, we must now turn to the merits of the Petitioners' appeal. The first question to be addressed is whether the Coastal Council properly denied the Beards' permit request. Only after determining the answer to that question should we then turn to the constitutional issues.

The area seaward of the existing bulkhead is all beach critical area which is regulated by the South Carolina Coastal Council pursuant to §48-39-10, et. seq. Within this beach/dune critical area on

the salt water beaches of South Carolina, the Council permits only two uses, that being the construction of a walkway which is exempted under §49-39-30 and the construction of erosion control structures under certain strict requirements. It was the Council's determination that the issuance of a permit would be in violation of the Coastal Management Act, the Coastal Management Program and the Rules and Regulations promulgated thereunder as it relates to seawalls, and that the application did not fit into the exemption provision.

The decision of the Defendant to deny the permit is supported in fact and law by the following:

The 1977 Coastal Management Act was passed by the General Assembly as a

recognition that "increasing and competing demands upon the lands and waters of our coastal zone occasion by population growth and economic development...have resulted in the decline or loss of living marine resources, wildlife, nutrient rich areas, permanent and adverse changes to ecological systems, decrease in open space for public use and shoreline erosion." (§48-39-20(B)). It further recognized that "important ecological, cultural, natural, geological and scenic characteristics...are being irretrievably damaged or lost by ill-planned development," and that there was an "urgent need to protect and give high priority to natural systems in the coastal zone while balancing economic interests." (See 48-39-20(E) and (F) respectively.)

In addition to the findings of the Act, both the program document and the rules and regulations find substantial value in dry-sand beaches. Rule 30-1(B) sums up the findings concerning the value of this resource most succinctly, as follows:

> Each year millions of South Carolina citizens and visitors enjoy the natural setting of the state's shoreline. Aesthetically the beaches are a unique experience; and recreational, these areas are increasingly needed for boating, swimming, sunning, and fishing, as leisure time

and mobility continue to increase.

Beaches and dunes are nesting grounds for sea turtles and numerous bird species, several of which are endangered. The beaches and adjacent coastal waters are also habitat for many marine species.

Probably the most vitally important aspect of the beach and dune system is its contribution to storage of sand the shoreline stability. This system serves as a barrier which protects adjacent

inland areas, dissipating the energy of storm waves. The dunes are a source of sand to aid in the natural renourishment of the beach from the landward side.

The beach itself is relatively tolerate to normal recreational use such as walking or fishing. It is important, however, that enough room be allotted between structures and the shoreline so that if natural erosion occurs, natural deposition can restore the beach without the occurrence of property damage.

These same resources of beaches and dunes are desirable locations for habitation and recreation and are subject to intense development. It should be noted, however, that housing and commercial activity may not be compatible with the rapid changes which occur naturally on some beaches and dune areas due to erosion and the effect of hurricanes. Therefore, regulations to ensure sound development in the critical areas are essential to protecting the resources as well as

protecting lives and property."4 [For further findings and policies see IV 51-65. State of South Carolina Coastal Management Program (1979).]

As a result of the obvious adverse impact erosion control structures have on beaches, the Council has followed an increasingly tighter policy of avoiding hard structures on the beach and has encouraged moving them as landward as possible when a structure is permitted. This is supported by the policies of the Act and pertinent rules and regulations. Section 48-39-30 specifically provides that the Council must:

(B)(1) "Promote economic and social improvement of the citizens of this State and to encourage development of the coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safegaurds with respect to the construction of facilities in the critical areas of the coastal zone;

(B)(2) Protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;"

In order to implement these policies, the Council has promulgated rules and regulations which clearly provide that the Appellants' permit application should be denied. These regulations are as follows:

(1) The Council will promote the use of natural features of the dune and beach system rather than artificial protection. [R.30-13(A)(1)(b)].

(2) Erosion control structures must not interfere with existing or planned public access unless other adequate access cannot be provided. [R.30-13(A)(1)(d)].

(3) All erosion control projects must consist of environmentally accepted materials, demonstrate sound design and construction so that they could reasonably be expected to be safe and effective and minimize adverse effects on the beach. [R.30-13(A)(1)(f)].

(4) Erosion control structures should not normally be approved except when erosion imminently threatens permanent improvements, including but not limited to buildings, paved parking lots, swimming pools, etc., which existed on the subject property ninety (90) days after the adoption of this regulation (September 27, 1981); or in the case of protecting property adjacent to existing erosion control structures; or, in the case of structures specifically called for in

an approved erosion control plan. [R.30-13(A)(1)(g)].

(5) All applications for construction of a seawall/bulkhead/revetment in the beach or sand dune critical areas for purposes of filling behind these structures for the creation of land for private or public development will be denied by the Council. [R.30-13(A)(1)(b)(i)].

(6) The Council must consider the cumulative effects of any project. [R.30-11(C)].

Applying the law and rules and regulations to the case at hand we find a permit application which seeks to advance a bulkhead on the dry-sand beach to these property lines for the purpose of erosion control. This is in violation of the law, policy and rules and regulations because:

(1) The Council is charged with the responsibility of promoting the natural features of dunes and beach systems rather than artificial protection.

(2) There is existing and historical public access laterally along the beach in front of the existing

wall which will be lost to the project.

(3) There is currently no erosion at the site and there are no permanent structures imminently threatened. While there is an adjacent erosion control device, that does not mean that an applicant can automatically move an existing seawall seaward to bring them in line with one another. In addition, the Council has always required that devices be on both sides of a proposed project in order to be eligible for construction.

(4) The project would have the effect of creating land for private use because filling behind the bulkhead would be required.

(5) Issuance of this permit could have a serious cumulative effect on this and other beaches by reclamation of critical area for private purposes.

In addition to the fact that the project would violate the clear intent of the rules and regulations, other factors supported the denial of the permit. First, the permit purpose can be met without issuing the permit. The

Petitioners have an existing wall at the site. Second, it was evident from the testimony that this beach is accreting and that the Council only issues erosion control devices where there is an immediate erosion problem. Third, the device as displayed on the plans would offer no greater relief than the existing walls in time of storm. Finally, the Council is taking a long range management view, relying upon the North Myrtle Beach Shorefront Management Plan which did not recommend placement of a wall at the site and the obvious problem of sea level rise.

The denial of the permit is a wise management decision only from the point of view of the purposes set forth in the Coastal Management Act of 1977. The Oil and Gas Act also supports the preservation of the beaches of the coastal zone and

speaks to the urgent need to give high priority to the natural system. There the General Assembly found and declared that the beaches should be maintained "in as close to a pristine condition as possible..." This comports with the decision to deny this permit and supports the conclusion made by the Council.

By way of the foregoing, it is clear that the Council is protecting a valuable resource and doing it in a manner consistent with the intent of the Coastal Zone Management Act to protect and wherever possible to restore significant natural resource critical areas. Thus, there is a substantial and legitimate state interest involved. Given the significance of the public purpose in preserving the beach critical area, the permit was properly denied by Council.

Issues of Prescriptive Rights, Implied Dedication, Custom and Usage, and Public Trust

Although I agree that the Coastal Council had the authority to deny the Beards' permit request, it is important to explain the reasons for that ruling, in light of the many theories put forth in the Final Administrative Order. My ruling is based solely upon the powers granted to the Coastal Council in the Act. Charged with a broad and difficult task in managing the coast of the State, the Act grants the Coastal Council reasonable powers to enforce the Act's provisions. Among these is the power to grant, deny and revoke permits. My ruling in this matter is based upon those powers of the

Council, granted by the Act, and as applied to the facts of this case.

In its Final Administrative Order the Coastal Council cited various other legal bases for its ruling. Due to the importance of these issues, I will briefly review them.

The Coastal Council proposed that the general public has a vested interest in the dry-sand beach up to the bulkhead line because the public has used, and the landowners have acquiesced to the usage, of the dry-sand beach. The Council specified several legal doctrines which it alleged support this theory. These included prescriptive rights, implied dedication, custom and usage, and an expanded Public Trust Doctrine.

The Council suggested that the public, through long and continued use of a dry-sand beach, acquired the rights of the landowner. The Council asserts that due to the public's use of the Grand Strand, and the entire coastline along the Atlantic Ocean, for various forms of recreation, the dry-sand beach of the Grand Strand, landward from the mean high tide designation to some landward obstruction, is now held in trust by the State of South Carolina for public purposes or has otherwise somehow passed to public ownership or control. As such, the Council contended that the private property owners' interests in this land have been superceded by the State's interest in maintaining the dry-sand beaches for public use.

I find that neither prescriptive easement, implied dedication, custom and usage or the Public Trust Doctrine as these theories are interpreted in existing South Carolina law, support the Council's contention that the Beards', or any of the dry-sand beach of the Atlantic coastline, is held in trust by the State of South Carolina for public purposes or is subject to some public right of usage superior to the landowners. Since these theories were never asserted by the Coastal Council as reasons to deny the Beards' permit at the administrative level, and only appeared in the Final Order, I find that they are not properly before the Court. Even if they are, I find them inapplicable to this case for the reasons set out below.

1. Prescriptive Easements

South Carolina has equated prescription with adverse possession and has required the use of land to be exclusive, continuous, uninterrupted, adverse, under a claim of right, and for a statutory period of 20 years, before prescription will deny the private property owner rights in his land. Watt v. Trapp, 31 S.C.L. 136 (2 Rich.) (1845). South Carolina courts also recognize "neighborly courtesy" and have been very cautious about granting the public rights in land which the landowner has graciously allowed the public to use. State v. Murphy, 1224 S.C. 274, 117 S.E. 529 (1923). The claimant must additionally produce evidence that the use was confined to a definite area and easement rights can be established only in the particular piece of property that is the subject of

the litigation. Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 457 (1951).

There is no testimony in the record which indicates that any specific individual has enjoyed a continuous uninterrupted use, adverse to the Beards under a claim of right for a statutory period of 20 years. In fact, there is little, if any, testimony concerning public use of the Beards' property at all. Most of the testimony dealt with the Grand Strand in general. Nor is there any evidence in the record which could consequently extend this legal theory to the entire Atlantic coast. The Council's contention that a prescriptive easement in favor of the public exists on the Beards' or any dry-sand beach is unfounded and improper under existing South Carolina law and under the facts of this case.

2. Implied Dedication

Dedication is the devotion of land to a public use by an unequivocal manifestation of the fee owner that the property be accepted and used for such public purpose. In South Carolina, the burden of proof is on the party seeking relief, who must show that the property owner's conduct clearly, convincingly, and unequivocally indicates, expressly or by plain indication, the purpose of the intention to create a right in the public to use the land adversely to him as of right. Stone v. International Paper Co., 293 S.C. 138, 359 S.E.2d 83 (Ct. App. 1987).

To establish implied dedication in South Carolina, a claimant must also show

that the dedication was accepted in the recognized legal manner. Stone, 293 S.C. 138. Most previous South Carolina cases addressing this doctrine have involved the dedication of streets and highways to the public. These cases have specified that evidence that the public uses the property is not sufficient to imply dedication, rather, this evidence must be accompanied by an assertion of control over the street or highway by the municipality. Darlington v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977). This showing is necessary because the creation of a public street or highway imposes a maintenance duty on the public, and the municipal authorities as the public's representatives must accept the duty.

The issue of implied dedication of sandy beaches has already been ruled on in

this State. In State v. Beach Co., 271 S.C. 425, 248 S.E.2d 115 (1978) our Supreme Court was faced with this same argument put forward by the State and determined that it did not have any application to the beaches in this State.

> "The real issue in the case is whether the public in general has acquired a permanent easement or prescriptive right of user over the area in question, which effectively prohibits sale or development of it by the owner of the fee simple title". 271 S.C. at 427. [Emphasis Added.]

The issue was also described as follows:

> "The [State] claims that the Beach Co.'s title is subject to...Easement By Dedication As May Exist." 271 S.C. at 427.

Although "custom and usage" and the public trust doctrine were not mentioned by name in Beach Co., it is clear that the issue of public use of private beach was squarely before the Court. In that case, the disputed area ran from the road all the way across the dry-sand beach to the high water mark of the Atlantic Ocean. As in the Beards' case, the property in dispute had been used by the public from time to time.

"Over the years property owners and others have traversed certain portions of the disputed property, going to and from the beach area...[S]uch use of the property as was made by the public was permitted by the owner". 271 S.C. at 421.

In holding that the public had no rights of a recreational easement on the owner's land the Court held:

"It is generally accepted that to constitute a valid dedication, there must not only be an intention on the part of the owner to dedicate a property to the

public use, but that such intention must be manifested in a positive and unmistakable manner... Absent an express gift, one who asserts a dedication must demonstrate conduct on the part of the landowner clearly, convincingly and unequivocally indicating his intention to create a right in the public...

Since we know that individual owners of property are not apt to transfer it to the community or subject it to public servitude without compensation, the burden

> of proof to establish dedication is upon the party claiming it...
>
> [P]roof must usually be strict, cogent, and convincing and the acts proved must be inconsistent with any construction other than that of dedication". 271 S.C. 425, 431, 432.

As such, the law in South Carolina does not support the Council's position that the Beards impliedly dedicated their land to the State, nor will it support the expansion of this doctrine to the entire South Carolina coast's dry-sand beach.

3. Custom and Usage

The Coastal Council's order also suggests that the Doctrine of Custom and Usage, if accepted in this State, would provide that the public had acquired rights int he dry-sand beach, over and against the private property owners' rights, through long usage. In support of this position, the Council's Final Administrative Order cited several "facts at hand:"

a. The public has used the Grand Strand beaches for general recreation for generations, up to the dune or vegetation line;

b. In this case, specifically, the public has regularly used the area of this lot up to the Appellants' bulkhead;

c. The recreational use at the Grand Strand area is uninterrupted;

d. Their use has been free and without dispute;

e. Recreational use at the beach is a reasonable, common use of the beach. The beach is suitable

to the recreational use;

f. The use has not been left to landowners but dictated by custom;

g. It is not repugnant to law and in fact supported by various acts of the Legislature.

In legal support of its contention, the Coastal Council cited an Oregon case, State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) and Darlington v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977). The Doctrine of Custom and usage

has not been recognized in any South Carolina case.

The Customs Doctrine was developed in England where the practice of a particular locality, although not written into the common law, could become the law of that place. Graham v. Walker, 78 Conn. 130, 61 A. 98 (1905). To achieve the statute of law, the custom "must have continued from time immemorial, without interruption, and as of right; it must be certain as to the place, and as to the person; and it must b e certain and reasonable as to the subject matter of rights created." The Case of Tanistry, Dav. 23, 31-32, 80 Eng. Rep. 156 (K.P.D. 1674). To be immemorial, the custom must have been exercised since "a time when the memory of a man runneth not to the contrary." 12 Harlsburg's Laws of

England, Custom and Usages (1975). This requirement has been construed to mean from the coronation of Richard I in 1189. Graham, 78 Conn. at 131. Several requirements must be satisfied to establish a custom; (1) the use must be ancient; (2) continuous; (3) peaceable; (4) free from dispute; (5) reasonable; (6) the area of use must be certain; (7) the landowner must be obliged to permit the use; and (8) the use must be consistent with other law. 1 W. Blackstone, Commentaries *75 through *78.

The application of the Custom Doctrine to the "facts at hand" provided by the Coastal Council raise significant logical and constitutional problems. Most American jurisdictions have refused to recognize custom rights in beach property or in any other property. Smith v. Bruce,

241 Ga. 133, 244 S.E.2d 559 (178); Department of Natural REsources v. Mayor of Ocean City, 274 Md. 1, 332 A.2d 630 (1975); Gillies v. Orienta Beach Club, 159 Misc. 675, 289 N.Y.S. 733 (N.Y. S.Ct. 1935); Graham, 78 Conn. 130. Several jurisdictions have held that because it is literally impossible for American custom to have existed since time immemorial, the Doctrine of Custom is inapplicable in America. Delaphane v. Crenshaw and Fisher, 56 Va. 880, 16 Gratt 457 (1860). Other jurisdictions have held that custom is obsolete doctrine because methods exist for recording rights in land. Gillie, 159 Misc. 675. Custom has also been noted to violate the rule against perpetuity. J. Gray, The Rule Against Perpetuity, §586 (4th Ed. 1942). Other courts have held that the rights of use in the public could not be established by custom because a

custom so general would be indistinguishable from the law itself. Albright v. Cartwright, 65 N.J.L. 330, 45 A. 634 (1900).

South Carolina has not previously recognized custom and usage, and the doctrine has been overwhelmingly rejected in other jurisdictions. Even if the Custom Doctrine was recognized in South Carolina, the Council has failed to place facs in the record to support the extinguishment of private property rights in the Beards' or any South Carolina dry-sand beach by custom. For example, the area of use is not defined nor is the use consistent with other law, specifically with long-recognized private property interests and constitutional rights. For all the foregoing reasons, the Coastal Council's reliance on the Custom Doctrine

to support its contention that the public interest in the recreational use of the dry-sand beach supercedes individual property owners' rights is improper.

4. The Public Trust Doctrine

The Coastal Council also advocated a broad expansion of the public trust doctrine. The Council contended that the traditionally recognized public trust lands should be expanded to include the dry-sand beach bordering the Atlantic Ocean above the Ban high water mark. The Council also advocated the extension of the doctrine to recognize a public interest in the recreational use of the tidelands.

The general South Carolina law regarding the public trust doctrine is set

out in Cape Romain Land and Improvement Co. v. Georgia Carolina Canning Co., 148 S.C. 428; 146 S.E. 434 (1928).

The South Carolina Supreme Court explained with regard to grants by the government of land bordering on tidewater;

> [i]t has been distinctly settled that they [the grants) only extend to high water mark, and that the title to the shore and lands under water in front of lands so granted enure to the state within which they are situated, if the state has been organized and established there. Such title to the shore and lands and water is

> regarded as incidental to the sovereignty of the state - a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery.

Cape Romain, 148 S.C. at 432. Thus, as developed in England, the public trust doctrine in South Carolina applies only to lands over which the tide ebbs and flows, commonly called the foreshore, which extends between the mean low tide and the mean high tide. Rice Hope Plantation, 216 S.C. 500.

In South Carolina, public trust lands are those covered by waters that are navigable by vessels or boats, employed in the ordinary course of water commerce.

The doctrine presently extends only to the public's right to navigate and fish in these areas. Rice Hope Plantation v. S.C. Pub. Serv. Auth., 216 S.C. 500; 59 S.E.2d 132 (1950). South Carolina has not recognized recreation as a proper public use of public trust lands.

The question raised by the Coastal Council is whether the public trust doctrine can be extended in this case to include the privately owned dry-sand beach that is only rarely covered by the tides. Attempts to expand the doctrine to include the dry-sand area of the beach were rejected at common law and have been rejected by most American jurisdictions. Attorney General v. Chambers, 4 De. Ge. M. and G. 206, 43 Eng. Rep. 486 (1854); Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10, 56 S. Ct. 23, 80 L.Ed. 9 (1935).

The United States Supreme Court has rejected attempts by states to extend the landward boundary of the public trust lands. In Hughes v. State, 67 Wash.2d 799, 410 P.D. 20 (1966), rev'd sub nom., Hughes v. Washington, 389 U.S. 290, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967), the Washington Supreme Court held that the landward boundary of the wet-sand area was the vegetation line and that state ownership extended to that line. The United States Supreme Court reversed the decision, finding that state ownership extended only to the mean high tide line. Citing its decision in Borax Consol. Ltd., supra, the court stated that the question of ownership of the tidelands is a federal question.

In South Carolina, the doctrine has always been narrowly

construed and, in fact, private property interests, when established by the proper burden of proof, have been held to be superior to the public trust. As such private ownership of public trust land has been specifically recognized by the South Carolina Supreme Court. Cape Romain, 148 S.C. 428.

The Coastal Council relied heavily upon several New Jersey decisions which have found that the public trust warranted recreational public use of the dry-sand area "subject to an accommodation of the interest of the owner." Matthews v. Bayhead Improvement Assoc., 95 N.J. 306, 325, 471 A.2d 355 (1984); Borough of Neptune City v. Borough of Avon by the Sea, 61 N.J. 296, 294 A.2d 47 (1972). Thus far, New Jersey is the only state to recognize any public trust interest in

privately-owned dry-sand beaches. The New Jersey courts have limited this application of the public trust doctrine to privately owned dry-sand beach to 1 1/4 mile of beach which was operated by its private owners as if it were a municipal beach.

The expansion of the public trust doctrine to the entire Atlantic Coast dry-sand beach is beyond the scope of New Jersey's aberrational construction of the public trust doctrine. To expand the public trust doctrine to encompass recreation as a public use, and to change the century old definition of public trust lands to include dry-sand beaches from the mean high water mark to the first landward obstruction, is unprecedented in any jurisdiction and certainly in South Carolina. As such, the Coastal Council's

position is unfounded and improper pursuant to existing South Carolina law.

Therefore, I find that the extinguishment of private property rights, in the dry-sand beach under a prescriptive easement, an implied dedication, a custom and usage or a public trust doctrine theory would violate existing South Carolina law. This violation would occur whether the entire Atlantic Coast shoreline is involved or merely the Beard's property which is the subject of this dispute. Moreover, even if we were to adopt one of these doctrines in support of the Coastal Council's contentions, a "taking" without just compensation would result. If one of these doctrines was adopted, it would necessarily apply to the coast of the entire state and, thus constitute a mass taking of the state's

entire dry-sand beach. I am not willing to adopt that position.

The "Taking" Issue

Having determined that the Coastal Council was within its rights to deny the Beards' permit request, we est now determined the impact of that denial on the Beards Property. They have alleged that such a denial would constitute a governmental "taking" contrary to the provisions of both the South Carolina and United States Constitutions.

What Constitutes a "Taking"

A governmental taking of a citizen's privately owned property, in its most obvious sense, would involve the government's actually taking physical

possession of that property, to the exclusion of the owner. These cases could involve such instances as the government seizing supplies in time of war, or building public improvements, such as roads, on private property. In such instances there is no question that the government must pay compensation under the applicable constitutional provisions. Most cases involving such actions are resolved under the eminent domain statutes and revolve on the issue of value and damages.

Aside from these cases in which physical possession is openly and clearly taken by the government, there are other circumstances which may lead to a judicial finding that a "taking" has occurred. It is in that sense, and on that body of law, that the Beards rely.

1. South Carolina Decisions

The South Carolina courts have been among the leaders in the nation in protecting private citizens against "inverse condemnation", or a "taking" that does not involve actual physical possession of the property by the government. At least as early as 1933 the State Supreme Court was faced with a question relating to an alleged taking by virtue of governmental over-regulation of private property. In the case of Henderson v. City of Greenwood, 172 S.C.9 16, 172 S.E. 689 (1933), the court reviewed a situation involving zoning regulations passed by the City of Greenwood. In that case the court held that if a law deprives an owner of "one of its essential attributes, or hampers the

owner in the application of it to the purpose of trade, or imposes conditions upon the right to hold or use it"... it would constitute an unconstitutional taking of that land.

It has been repeatedly held that property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything that destroys one or more of these elements destroys the value of the property and "ownership is rendered a barren right" Gasque v. Town of Conway, 194 S.C. 15, 32, 8 S.E.2d 871 (1940).

In looking at the question of "what constitutes a taking" we can be guided to a large degree by previous rulings in the State Supreme Court. Our court has taken a very protective position

relative to private property and "has previously adopted and adhered to the broadest possible view of what is a taking . . . Kline v. City of Columbia, 249 S.C. 532, 155 S.E.2d 597 (1967). Although each case must be decided on its own merits, it has been held that there is a taking of the owners property with any act done which substantial y restricts or abridges the right of owner". James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661, 667 (1955).

In trying to give meaning to this "broadest possible view" the court has found a taking in a wide variety of circumstances. Among these have been the flooding of private property, Lindsay v. City of Greenville, 247 S.C. 232, 146 S.E.2d 863 (1966); Chick Springs Water Co. v. State Highway Dept., 159 S.C. 481, 157

S.E. 842; negligent highway construction, Greens v. S.C. Highway Dept., 239 S.C. 44, 121 S.E.2d 240 (1961); restrictive zoning ordinances, Henderson v. City of Greenwood, supra, James v. City of Greenville, supra, ordinances relating to hours of operating a business, Painter v. Town of Forest Acres, 231 S.C. 56, 97 S.E.2d 71 (1957); and the substitution of salt water flooding for fresh water flooding, Farly v. S.C. Public Service Authority, 228 S.C. 392, 90 S.E.2d 472 (1955).

Each of these cases has upheld the basic rulings of Henderson and Gasque in holding that "there may be a taking of property in the constitutional sense although there has been no actual entry . . . and no artificial structure has been erected upon it". Lindsay, supra.

As recently as 1984 the refusal by the City of Hanahan to allow a property owner fill a portion of her property was deemed to be a taking. Hill v. City of Hanahan, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984).

The Coastal Council cites the case of Carter v. S.C. Coastal Council, 281 S.C. 210, 314 S.E.2d 327 (1984) as authority for the proposition that no "taking" has occurred. The Carter case is clearly distinguishable on its facts. In that case, the landowner was attempting to build a bulkhead in a flooded marsh and change the character of his property from flooded land to dry land. This is not the case here. The record reveals that the sand on the seaward side of the existing seawall is generally the level equal to

that on the back of the bulkhead. The Beards are not trying to change the character of their land as in the Carter case.

Federal Court Decisions

In addition to these state court interpretations of the "taking clause" it is also necessary to look to the rulings of the federal courts on questions relating to the United States Constitution. Most of the federal court cases dealing with a regulatory taking follow the same line of reasoning as the South Carolina courts. The United States Supreme Court has often spoken on the same question. It too has held that there is "no-set formula [existing] to determine, in all cases, whether compensation is constitutionally due for a government

restriction of property." Loretto v. Teleprompter, 458 U.S. 419, 426, 102 S.Ct. 3164, 3171 (1982).

> "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it'. United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 557 (1945) . . . The power to exclude has traditionally been one of the most treasured strands in an owner's bundle of property rights." 458 U.S. at 435, 102 S.Ct. at 3176.

Several recent cases bear a similarity to the facts of the case before

us. Kiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383 (1979) involved an effort by the U.S. Army Corps of Engineers to enforce public access to a privately owned marina. Its theory was that since the marina had come under the jurisdiction of the Corps of Engineers by virtue of its navigability, it would also be subject to public access. The Supreme Court held that the government could not impose such an easement on the private property without paying compensation. In the case before us all of the parties concede that the contested property is within the jurisdiction of the Coastal Council, but it does not necessarily flow from that position that the public has a right to access of the Beard's property.

"In this case we hold that the 'right to exclude', so

> universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation . . . And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation. Kiser Aetna, 444 U.S. at 179, 180, 100 S.Ct. at 393.

In First English Evangelical Lutheran Church v. County of Los Angeles, ___ U.S. ___, 107 S.Ct. 2378 (1987) the Supreme Court faced a case in which the local government was prohibiting the

rebuilding, or building, of improvements in a flood prone area. In this regard it is similar to the Coastal Council 's prohibition of the Beards proposed bulkhead. The ruling by the Supreme Court in that case can provide some guidance in ours.

> "We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of the self executing character of the constitutional provision with-respect to compensation." ___ U.S. at ___, 107 S.Ct. at 2386.

In its discussion of the applicability of the "taking" clause of

the Constitution to temporary takings, the Court said:

> "It has also been established doctrine at least since Justice Holmes' opinion for the Court in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." ___ U.S. at ___, 107 S.Ct. at 2386.

In its discussion of the applicability of the "taking" clause of the Constitution to temporary takings, the Court said:

> "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". ___ U.S. at ___, 107 S.Ct. at 2388.

The First English case reaffirmed the Supreme Court's long held position on inverse condemnation and governmental

regulation which parallels the holdings of our State Supreme Court. Seventeen days later the Supreme Court applied those principals to a case very similar to the Beards'. The case of Nollan v. California Coastal Commission, ___ U.S.___, 107 S.Ct. 3141 (1987) bears such striking similarities to the Beard's case that it bears detailed review.

James Nollan and his wife owned a beachfront lot in Ventura County, California. On his property, but landward of his oceanside property line, was a concrete seawall. The effect of the seawall was to divide his lot into two areas, that lying landward of the seawall and the other lying seaward of the seawall and extending to his property line. That latter portion was on the beach, but was privately owned. In this regard the

situation is virtually identical to the case before us.

The Nollans sought a permit to construct a house on their lot, in much the same way that permits are required by the South Carolina Coastal Council for work done within the critical area. The Coastal Commission allowed issuance of the permit, but with the condition that the Nollans grant the public an easement over the portion of their private property lying seaward of the seawall. Contesting this condition, the Nollans engaged in full evidentiary hearings before the Coastal Commission, following which that administrative agency upheld the condition.

"Had [the State] simply required the [landowner]

to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house or their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowners premises does not constitute the taking of a property interest but rather 'a mere restriction of its use', . . . is to use words in a manner that deprives them of all their

ordinary meaning".

Nollan, ___ U.S. at ___,

107 S.Ct. at 3145.

[Emphasis added.]

Since public use or public access to the Beard's property is apparently the only real reason for denying their permit, this holding would seem to be directly applicable to our facts.

As the Nollan court continued to explore the inverse condemnation claim in that fact situation it reiterated the law as set out previously in its own decisions and enunciated in those of this State.

"We have repeatedly held that, as to property reserved by its owner for private use, 'the right to

exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property'." ___ U.S. ___, 107 S.Ct. at 3145.

[W]here governmental action results in '[a] permanent physical occupation' of the property . . . our cases uniformly have found a taking to the extent of the occupation, <u>without regard to whether the action achieves an important public benefit or has only minimal economic impact on the</u>

owner. [Emphasis added.] . . . We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, . . . even though no particular individual is permitted to station himself permanently upon the premises". Nollan, ___ U.S. ___, 107 S.Ct. at 3145.

"[R]equiring uncompensated conveyance of the easement outright would violate the Fourteenth

Amendment . . . " 107 S.Ct. at 3146.

The Nollan Court concluded its opinion with this observation.

"California is free to advance its 'comprehensive program if it wishes, by using its power of eminent domain for this 'public purpose'. . . but if it wants an easement across the Nollans' property, it must pay for it". Nollan, ___ U.S.___ 107 S.Ct. at 3150.

In applying the facts of this case, as set out in the record, to the law

of inverse condemnation in general, and the recent Supreme Court rulings in particular, several facts come to light. It is apparent in its Order that the Coastal Council relied almost exclusively on the lack of public access that the proposed seawall would impose on the portion of the Beards' Property lying between the existing seawall and the proposed seawall. In the 39 page Order issued by the Coastal Council there are no fewer than 21 separate references to the State's support of public use of the Petitioners' land and the State's efforts to prevent interference with the public use. Among those are the following statements:

"It finds that the appropriate use for the 4,300 to 4,400 square feet

of beach impacted by this project is that of public recreation." p. 17.

"Here, the private use of dry sand beach is inconsistent with the common good." p. 30.

The essence of the Order is that the Coastal Council is concerned that, if the proposed seawall is built, the public wall will be excluded from the Beards' property. If there is any question of that fact it should be dispelled by a reading of the following question and answers from the transcript of the administrative hearing. The questioning was of the Coastal Council's Permit Administrator.

"Q. So your concern here was that the Beards might somehow keep the public from using the Beard's property.

A. Keep them from using the beach they own; that's right.

Q. But the way you have interpreted this Act now . . . the only use for that property now is as a public

beach, is that correct?

A. I think that is one of the primary uses we look at it as. It is the dry sand beach; it's a public beach."

Based upon a close review of the record from the administrative proceeding it is evident that a denial of the Beards' permit request would have the effect of turning a portion of their privately owned property into a "public beach". It is equally evident that this is the purpose of the permit denial. I have previously held that such as denial is within the police power of the State and the Coastal

Council under its enabling legislation. I find, however, that such a denial has the effect of depriving the Beards of their unrestricted right to use their property, the unrestricted right to enjoy and dispose of their property and the right to exclude others from their property. I, thus, find that the denial of the Beards' permit constitutes a governmental "taking" of their property lying between the existing seawall and the purposed seawall, in violation of Article I, Section 13 of the South Carolina Constitution and the Fifth Amendment of the United States Constitution.

The court recognizes the difficult position in which the Coastal Council finds itself in attempting to implement a plan for coastal development that also makes sense environmentally. That

realization, however, does not mean that the State can force those citizens that own oceanfront land to shoulder the burden for the entire State. The United States Supreme Court best expressed these same thoughts in the First English case:

> "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land use planners and governing bodies . . . But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provision of the Constitution are designed to limit the flexibility

and freedom of governmental authorities and the Just Compensation a clause of the fifth Amendment is one of them . . . [A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the chance". ____ U.S. at ____, 107 S.Ct. at 2389.

To further paraphrase the opinion in the Nollan case:

"[The State] is free to advance its 'comprehensive

> program' if it wishes, by using its power of eminent domain for this 'public purpose' . . . but if it wants an easement across the [Beards'] property, it must pay for it." Nollan, supra, 107 S.Ct. at 3150.

Based upon the foregoing, it is;

ORDERED, that the Coastal Council's motion for partial dismissal is denied;

FURTHER ORDERED, that the administrative decision of the Coastal Council denying the Beards' request for a permit to construct a new seawall is hereby affirmed;

FURTHER ORDERED, that the denial of the Beards' permit request constitutes a "taking" by the State of the Boards' property between the existing seawall and the proposed seawall, in violation of Article I, Section 13, of the South Carolina Constitution and the Fifth Amendment of the United States Constitution.

FURTHER ORDERED, that the Beards' request for an award of reasonable attorney's fees and costs for this action pursuant to §28-11-30(3) Code of Laws of South Carolina, 1976, as amended shall be deferred and heard at the damage hearing described herein.

FURTHER ORDERED, that the question of the amount of damages and reasonable attorney's fees shall be determined at a

subsequent trial before this court in the same manner as other condemnation proceedings under the laws of this State.

JAMES E. MOORE
Presiding Judge
Fifteenth Judicial Circuit

Greenwood, South Carolina

September 8, 1989.